



**THE ATTORNEY GENERAL
OF TEXAS**

March 29, 1989

**JIM MATTOX
ATTORNEY GENERAL**

Honorable Jerry Cobb
Criminal District Attorney
for Denton County
P. O. Box 2344
Denton, Texas 76201-2899

LO-89-34

Dear Mr. Cobb:

You ask two questions concerning the effect of unrecorded easements on the transfer of real property:

1. If a person having knowledge of a claim of an easement on real property, which easement is not recorded and is not apparent from physical evidence on the property (such as utility lines), purchases the property for a valuable consideration from an owner who had no knowledge of the claim of easement at the time of his purchase for a valuable consideration, does the second purchaser take the property subject to the easement?

2. If the answer to the first question is 'no,' can the second purchaser establish title unencumbered by the claim of the easement before his purchase or, alternatively, after the purchase without waiting for the easement claimant to assert his claim in the future?

We must emphasize at the outset that the answers to your questions depend on factual determinations that must be made on a case-by-case basis.¹ An opinion of the Attorney

1. For example, your questions give no indication of the manner in which the easement was created, whether by express grant, implication, necessity, estoppel, or prescription. The resolution of this matter could determine whether your questions are governed by section 13.001 of the Property Code, a provision emphasized in materials
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General cannot resolve fact questions. The settlement of private disputes is reserved for the courts. This opinion, therefore, can do no more than summarize some of the relevant legal principles governing questions of the kind you present. Accordingly, it should not be read as an affirmation of any particular set of facts or as an endorsement of any particular claim against real property that may have been purchased under the conditions you describe.

An attachment to your letter quotes section 13.001 of the Property Code, which provides the following:

(a) A conveyance of real property or an interest in real property or a mortgage or deed of trust is void as to a creditor or to a subsequent purchaser for a valuable consideration without notice unless the instrument has been acknowledged or proved and filed for record as required by law.

(b) The unrecorded instrument is binding on a party to the instrument, on the party's heirs, and on a subsequent purchaser who does not pay a valuable consideration or who has notice of the instrument.

(c) This section does not apply to a financing statement, a security agreement filed as a financing statement, or a continuation statement filed for record under the Business & Commerce Code.

The purpose of recording acts such as section 13.001 is to protect innocent purchasers of real property against previous deeds, mortgages, or the like, which are not recorded, and to deprive the holder of the unrecorded interest of the rights which his priority would have given him under common law. See Cox v. Clay, 237 S.W.2d 798 (Tex. Civ. App. - Amarillo 1951, writ ref'd n.r.e.). In interpreting and applying recording statutes, the courts have relied on a number of rules for determining the validity of recorded and unrecorded interests in land.

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accompanying your request letter. Your questions also provide few details regarding the nature of the unrecorded easement and whether the first purchaser you describe was put on notice of the easement. These facts could determine whether either purchaser is entitled to the protection of the recording provisions of the Property Code.

Chief among these rules is the doctrine of the innocent purchaser.

An innocent purchaser of real property, often referred to as a bona fide purchaser, is one who in good faith purchases the property for a valuable consideration without notice of adverse claims against the property. See Equitable Trust Co. v. Roland, 721 S.W.2d 530 (Tex. App. - Corpus Christi 1986, writ ref'd n.r.e.).² Notice may be actual or constructive. A purchaser has actual notice if he has or should have express knowledge of an adverse claim to the purchased property, or if such knowledge may be implied or imputed to the purchaser. See 63 Tex. Jur. 3d, Real Estate Sales § 276 (1988). A purchaser is said to have constructive notice of an adverse claim where, apart from personal knowledge or sources of information, the law conclusively charges the purchaser with notice upon proof of certain facts. Id.

A purchaser of real property is charged with a general duty to inquire in regard to the seller of the property and to investigate the title. Id. § 290.. When the investigation discloses facts or circumstances that would cause a prudent person to make further inquiry as to the rights of other persons in the property, the purchaser is charged with notice of facts that a due and reasonable inquiry would have revealed. Id.; see Cooper v. Buetow, 269 S.W.2d 461 (Tex. Civ. App. - Eastland 1954, writ ref'd n.r.e.).

The first question raises the possibility that the owner of the real property may be an innocent or bona fide purchaser. The fact that there is no physical evidence of an easement does not necessarily mean that the prior purchaser was not put on notice of the preexisting easement. Notice can take many forms, too many to be usefully described in this opinion. See 63 Tex. Jur. 3d, Real Estate Sales §§ 275-309. The description of facts in the first question is insufficient to establish whether there was actual or constructive notice of the easement to the prior purchaser.

2. An "innocent purchaser" has been distinguished from a "bona fide purchaser" in that the former may acquire title free from certain undisclosed equities that bound the immediate grantee, provided the acquisition is without notice. Foster v. Buchele, 213 S.W.2d 738 (Tex. Civ. App. - Fort Worth 1948, writ ref'd n.r.e.).

Assuming, however, that the owner of the property was an innocent purchaser, the answer to your first question is clear. A purchaser from a bona fide purchaser of real property generally takes good title, even though he is not an innocent purchaser himself. See Popplewell v. City of Mission, 342 S.W.2d 52 (Tex. Civ. App. - San Antonio 1960, writ ref'd n.r.e.). Thus, a purchaser from a bona fide purchaser without notice takes title free of existing equities, even though the subsequent purchaser had actual or constructive notice of such equities. See Hunley v. Bulowski, 256 S.W.2d 932 (Tex. Civ. App. - Texarkana 1953, writ ref'd n.r.e.). This rule does not apply, however, where one who acquired title with notice of infirmities in the title conveys it to a bona fide purchaser and later procures a reconveyance. See Slaughter v. Qualls, 149 S.W.2d 651 (Tex. Civ. App. - Amarillo 1941), aff'd 162 S.W.2d 671 (Tex. 1942).

The second question you submitted is whether in the situation described in your first question, the second purchaser may establish clear title either before the purchase of the property or after the purchase without awaiting assertion of a claim by the holder of the unrecorded easement. Prior to the sale of the property, the second purchaser would have no ownership interest to assert or establish. A suit to quiet title or to remove a cloud on title to real property, however, may be maintained by a person having a legal or equitable interest in the property. See 61 Tex. Jur. 3d Quieting Title and Determining Adverse Claims § 7 (1988). Consequently, the second purchaser would be entitled to bring a cause of action to remove the cloud cast on his title by the unrecorded easement after he purchases and acquires an interest in the property. This answer, of course, assumes the second purchaser acquired good title, his knowledge of the unrecorded easement notwithstanding.

Very truly yours,



Sarah Woelk, Chief
Letter Opinion Section



Rick Gilpin, Chairman
Opinion Committee